IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

STATE OF OHIO,	:	APPEAL NO. C-130458 TRIAL NO. B-1206710
Plaintiff-Appellee,	:	*JUDGMENT ENTRY.*
vs.	:	
ALAN MARSHALL,	:	
Defendant-Appellant.	:	

We consider this appeal on the accelerated calendar, and this judgment entry is not an opinion of the court. *See* S.Ct.R.Rep.Op. 2; App.R. 11.1(E); 1st Dist. Loc.R. 11.1.1.

Defendant-appellant Alan Marshall entered guilty pleas to felonious assault ("Count 1") and domestic violence ("Count 2") for acts that occurred on September 27, 2012, and he entered guilty pleas to felonious assault ("Count 3") and domestic violence ("Count 4") for acts that occurred on September 30, 2012. The trial court convicted Marshall of all four counts and imposed the agreed sentence of seven years in prison. Marshall now appeals, raising three assignments of error. For the following reasons, we affirm.

In his first assignment of error, Marshall contends that the trial court erred by failing to merge his convictions for domestic violence and felonious assault as they are allied offenses of similar import. We disagree.

Marshall agreed to a sentence of seven years in prison. Under R.C. 2953.08(D)(1), a sentence is not subject to review if it "is authorized by law, has been recommended jointly by the defendant and the prosecution in the case, and is imposed by a sentencing judge." The Ohio Supreme Court has held that a sentence is "authorized by law" and is not appealable within the meaning of R.C. 2953.08(D) if it comports with all mandatory sentencing provisions. *State v. Underwood*, 124 Ohio St.3d 365, 2010-Ohio-1, 922 N.E.2d 923, ¶ 20.

Marshall acknowledges that he agreed to a seven-year prison term, but argues that his sentence was not authorized by law because his convictions for Counts 1 and 2 were allied offenses of similar import that should have been merged, and that his convictions for Counts 3 and 4 were allied offenses of similar import that should have been merged. But "when the transcript demonstrates that the state and defense counsel agreed that the offenses were not allied, the issue of allied offenses is waived." *State v. Yonkings*, 8th Dist. Cuyahoga No. 98632, 2013-Ohio-1890, ¶ 5; *see State v. Estes*, 12th Dist. Preble No. CA2013-04-001, 2014-Ohio-767, ¶ 11. ("absent a stipulation or agreement on the allied offenses issue, the imposition of multiple punishments for allied offenses is reviewable under the plain error analysis").

Here, the transcript demonstrates that the state and defense counsel agreed that none of the four offenses were allied offenses of similar import. The trial court, after discussing whether any of the offenses were allied, stated, "[i]f [the offenses] are separate acts and a separate mental state as to each, I think they do not merge unless there is disagreement." Defense counsel responded, "We have no disagreement with the non merger." Because the state and the defendant agreed that the offenses were not allied, this issue is waived.

Accordingly, the agreed sentence here was authorized by law, jointly recommended by the defendant and the state and imposed by the trial judge. Thus, the sentence is not appealable under R.C. 2953.08(D).

We note that even if the state and defendant had not stipulated that the offenses were not allied offenses of similar import, we conclude that the charged offenses were not allied because there was a separate injury for each offense on each day.

The first assignment of error is overruled.

In his second assignment of error, Marshall contends that the trial court erred by accepting his guilty plea when that plea was not made knowingly, intelligently and voluntarily. We are unpersuaded.

The record shows that in accepting Marshall's plea, the trial court conducted a thorough colloquy with Marshall, strictly complying with the provisions of Crim.R. 11(C) and correctly informing him about the constitutional rights enumerated in *Boykin v. Alabama*, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969). The court substantially complied with the rule in all other respects. *See State v. Ballard*, 66 Ohio St.2d 473, 423 N.E.2d 115 (1981).

Marshall argues that his plea was not made knowingly because his trial counsel represented to him that he would be eligible for good-time credit and that he could serve his sentence in an Illinois state prison. But the record does not reflect what Marshall claims to have occurred, and a reviewing court cannot add matter to the record before it and then decide the appeal on that basis. *See State v. Tekulve*, 188 Ohio App.3d 792, 2010-Ohio-2604, 936 N.E.2d 1030, ¶ 4 (1st Dist.). Therefore, we overrule Marshall's second assignment of error.

In his third and final assignment, Marshall contends that he was deprived of his right to the effective assistance of trial counsel. In order to demonstrate ineffective assistance of trial counsel, a defendant must demonstrate that counsel's performance was deficient and fell below an objective standard of reasonable representation, and that the defendant was prejudiced by counsel's performance; that is, there is a reasonable probability that but for counsel's unprofessional errors, the result of the defendant's trial or proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Bradley*, 42 Ohio St.3d 136, 538 N.E.2d 373 (1989).

Here, Marshall argues that he was "strong-armed" into accepting the plea deal and that his original trial counsel had lost photographic evidence of his injuries, which would have exonerated him. But Marshall admits that evidence of his claims is outside the record. As noted above, this court's review is limited to what can be ascertained from the record. There is nothing in the record concerning Marshall's claim that any photographic evidence was lost, and a review of the Crim.R. 11(C) colloquy does not demonstrate that Marshall was "strong-armed" into entering the plea agreement. In fact, Marshall indicated to the trial court during the colloquy that he was not promised anything, other than what already had been placed on the record, in exchange for entering into the plea agreement.

Because the record does not demonstrate that counsel's performance was deficient, we overrule the third assignment of error.

The judgment of the trial court is affirmed.

Further, a certified copy of this judgment entry shall be sent to the trial court under App.R. 27. Costs shall be taxed under App.R. 24.

HILDEBRANDT, P.J., HENDON and **DEWINE, JJ.**

To the clerk:

Enter upon the journal of the court on October 3, 2014

per order of the court _____.
Presiding Judge